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***In the Supreme Court of the United States***

OCTOBER TERM, 1982

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**ZURN INDUSTRIES, INC., PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

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***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT***

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**MEMORANDUM FOR THE NATIONAL LABOR  
RELATIONS BOARD**

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## **MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

Petitioner contends that the court of appeals erred in affirming the Board's holding that petitioner's discharge of six employees because of their safety complaints constitutes an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

1. The Board found (Pet. App. A-52 to A-65) that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by threatening employees with discharge, and by discharging six employees, because they protested unsafe working conditions. In so concluding, the Board, applying the principles set forth in *Wright Line*, *A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), found that the General Counsel had shown that petitioner's decision to discharge the six employees was motivated by their safety complaints and that petitioner

had not met its "burden of showing that it would have discharged the crew absent the crew's protected request to provide safety" (Pet. App. A-60, A-52 to A-64).

2. The court of appeals enforced the Board's order (Pet. App. A-1 to A-42). The court expressly concluded that the Board's *Wright Line* test constitutes a correct legal standard (Pet. App. A-7 to A-19) and found that substantial evidence supported the Board's finding that petitioner had discharged the six employees because of their protected conduct consisting of safety-related actions (*id.* at A-19 to A-22). The court acknowledged that its approval of the *Wright Line* test conflicted with decisions of the First and Third Circuits in which those courts had rejected the test insofar as it requires, once the General Counsel has proved that protected activity was a motivating factor in a discharge, that the employer "prove, as an 'affirmative defense,' that the decision would have been the same in the absence of the protected activity" (Pet. App. A-8 to A-10).

3. Petitioner's primary contention (Pet. 3-7) is that the court of appeals erred in accepting the Board's *Wright Line* test. On November 15, 1982, this Court granted the Board's petition for a writ of certiorari in *NLRB v. Transportation Management Corp.*, No. 82-168, a case in which the Board seeks review of a First Circuit decision rejecting the burden-shifting aspect of the Board's *Wright Line* test.<sup>1</sup> Although

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<sup>1</sup>The Board's brief in *Transportation Management* was filed on January 3, 1983. A copy of that brief has been sent to petitioner.

The Board also has filed petitions for certiorari in another First Circuit case and in two Third Circuit cases that rejected the burden-shifting aspect of the *Wright Line* test. *NLRB v. Heartland Food Warehouse, a Division of Purity Supreme Supermarkets*, No. 82-736 (filed Oct. 28, 1982); *NLRB v. Behring International, Inc.*, No. 82-438 (filed Sept. 13, 1982); *NLRB v. Blackstone Co.*, No. 82-1105 (filed Dec. 30, 1982).

the Board believes that the court of appeals' decision here is correct, the case presents the same issue that will be resolved by the Court in *Transportation Management*. Accordingly, to the extent that the petition presents the question of the propriety of the burden-shifting aspect of the *Wright Line* test, the Board does not oppose the petition.<sup>2</sup>

4. Petitioner also contends (Pet. 4-5) that the Board, upheld by the court of appeals, improperly overturned credibility findings of the administrative law judge (ALJ) and failed to defer to a contractual resolution of the grievance filed with respect to the discharges. Petitioner further suggests (Pet. 3-5) that 29 C.F.R. 1977.12, a regulation promulgated under the Occupational Safety and Health Act of 1970 ("OSHA"), Pub. L. No. 91-596, 84 Stat. 1590, rather than standards developed under the National Labor Relations Act, should govern employee complaints of retaliation for raising safety complaints.

Petitioner's objections to the Board's evidentiary findings raise fact-bound issues that do not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-492 (1951).<sup>3</sup> The court of appeals properly rejected petitioner's contention that the Board should have deferred

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<sup>2</sup>In the questions presented for review (Pet. i), petitioner challenges the application of the *Wright Line* test in this case on the ground that the Board's *Wright Line* decision was handed down after the ALJ's decision here and was applied by the Board retroactively to reverse the ALJ's decision. Petitioner did not raise the retroactivity issue before the Board by way of motion for reconsideration. Accordingly, no issue concerning retroactive application of the Board's test is presented here. See *Woelke & Romero Framing, Inc. v. NLRB*, No. 80-1798 (May 24, 1982), slip. op. 20-21.

<sup>3</sup>In any event, the decision of the court of appeals upholding the Board's findings is clearly correct. The court applied a more searching standard of review than normal in view of the Board's reversal of the ALJ's credibility determinations (Pet. App. A-20). It found that the ALJ's rejection of certain uncontradicted testimony was entitled to

to a contractual resolution of the grievance, relying on the settled principle that "the Board may in its discretion choose not to defer to [private grievance settlements] if, in its judgment, the public interest would not be served by doing so" (citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-271 (1964)) (Pet. App. A-23).<sup>4</sup> Petitioner does not suggest any reason why the Board was not justified in concluding that reinstatement of the employees was a proper remedy for the employer's violations of Section 8(a)(1). Finally, the court of appeals correctly rejected petitioner's contention that OSHA standards should govern the Board's consideration of safety-related discharges, noting that, in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 17-18 n.29 (1980), this Court expressly recognized that OSHA did not affect existing rights under the National Labor Relations Act. See also 29 C.F.R. 1977. 18(a)(1) (OSHA complainant may concurrently resort to other agencies for relief, including NLRB). Petitioner cites no authority that suggests that the Board was precluded from applying analysis developed under Section 8(a)(1) merely because the protected activity at issue involved safety complaints. Thus, its contention does not warrant further review.

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"little deference" and that the different inferences drawn by the Board from the record evidence concerning the motive for the discharges were supported by substantial evidence (Pet. App. A-20 to A-22). Contrary to petitioner's suggestion (Pet. 5), the failure of a company official to deny certain statements attributed to him by the employees at the time of the discharge was only one of several factors that the Board relied on in finding that petitioner's explanation was a pretext and that the actual motive for the discharge was the employees' protected activities (see Pet. App. A-53 to A-63).

<sup>4</sup>*Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 379 (1974), cited by petitioner (Pet. 4), involved litigation between private parties and thus did not address the question whether the Board should defer to a contractual settlement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the decision in *NLRB v. Transportation Management Corp.*, No. 82-168, insofar as it raises the question of the validity of the Board's *Wright Line* test, and should be denied with respect to the other questions presented.

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